No. 86-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALPHONSE DELLA-DONNA,

Petitioner,

—against—

GORE NEWSPAPERS COMPANY and HAMILTON C. FORMAN,

Defendants,

GORE NEWSPAPERS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH CIRCUIT

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Questions Presented For Review

1. Whether the decision of the Florida District Court of Appeal—by finding plaintiff to be a public figure even though plaintiff simply participated in private-party litigation over a gift from a private trust to a private institution, the public did not debate this gift and the defamations concerned alleged fiduciary breaches wholly unrelated to the gift or the private institution—subverts the constitutional balance struck by *New York Times* v. *Sullivan* by expanding the scope of the public figure doctrine and thus ignoring *Sullivan's* First Amendment focus on protecting uninhibited and robust public debate on public issues?

2. Whether the decision of the Florida District Court of Appeal, which afforded full *Sullivan* protection to defendant's publications, upsets the constitutional balance by eliminating the requirement of public debate on a public issue where the judicial resolution of the issue might have an impact on the public?

3. Whether the decision of the Florida District Court of Appeal misapplies the public figure analysis of this Court by converting into a public figure every plaintiff who participates as a party or attorney in a litigation that receives any substantial media coverage?

4. Whether the decision of the Florida District Court of Appeal undermines the balance struck by this Court, which protects the reputations of private persons under the common law, subject only to limited First Amendment restrictions, by not affording the same protection when the private affairs of a person found to be a "vortex" public figure are at issue?

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To the Justices of the Supreme Court of the United States:

Petitioner, Alphonse Della-Donna ("Della-Donna"), respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of Florida, Fourth District affirming the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida, dismissing petitioner's complaint against Gore Newspapers Company ("Gore Newspapers") on the grounds that Della-Donna was a "vortex" public figure who failed to present sufficient evidence of actual malice to defeat a motion for summary judgment under the principles of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Opinions Below

The order of the Supreme Court of Florida, declining in its discretion to accept jurisdiction, is reported at 494 So.2d 1150 (Fla. 1986) and is reproduced in Appendix C (17a-18a). The opinion of the Florida District Court of Appeal is reported at 489 So.2d 72 (Fla. 4th DCA 1986) and is reproduced in Appendix A (1a-12a). The opinion and order of the Circuit Court granting respondent's motion for summary judgment is unreported and is reproduced in Appendix B (13a-16a).

Jurisdiction

The order of the Supreme Court of Florida was rendered on September 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions Involved

1. First Amendment, United States Constitution:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

2. Fourteenth Amendment, Section 1, United States Constitution:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

Statement Of The Case

Alphonse Della-Donna, an attorney, brought this libel action against the Gore Newspapers Company ("Gore News-

papers") for six articles and a letter to the editor published in the *Fort Lauderdale News* and against Hamilton C. Forman for a radio broadcast. Della-Donna brought the action in the Circuit Court for Broward County, Florida ("trial court"), where Gore Newspapers[1] moved for summary judgment on several grounds after depositions had been taken, the pleadings formed and the case set for trial. The trial court granted the motion (App. B at 15a-16a). On appeal, Florida's District Court of Appeal for the Fourth District ("appellate court") affirmed, finding that Della-Donna was a "vortex" public figure in a matter of public controversy and that no genuine issue of fact existed as to evidence of actual malice (App. A at 11a-12a).

The Petitioner

Della-Donna is an attorney who practices law in Fort Lauderdale, Florida. In early 1971, he prepared a complex estate plan for Leo Goodwin, Sr., a Fort Lauderdale resident who had founded the Government Employees Insurance Company ("GEICO") (*see* App. B at 14a). The plan created, among other things, a charitable remainder trust ("Unitrust") and a private charitable organization, the Leo Goodwin Foundation of Fort Lauderdale, Inc. ("Goodwin Foundation").

Mr. Goodwin died on May 28, 1971. Della-Donna's law firm has acted since then as the attorneys for the Goodwin estate, the Unitrust and the Goodwin Foundation; Della-Donna has also served as one of three trustees for the Foundation ("Foundation Trustees").

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[1] Forman was not involved in either the summary judgment motion filed by Gore Newspapers or in the appeal.

The Foundation Trustees' Designation Of Donees And The Ensuing Litigation With Nova

In 1976, the Foundation Trustees fulfilled Mr. Goodwin's intent that his fortune be used to benefit local institutions by designating Nova University ("Nova"), a private university in Broward County, as one of three contingent donees of the Unitrust (App. A at 11a). Two years later, Della-Donna learned that Nova was not a locally controlled institution; rather, Nova had been controlled since 1970 by the New York Institute of Technology ("New York Institute"), which in turn was dominated by the Schure family of New York City. Della-Donna and the other Foundation Trustees contemplated rescinding the substantial gift to Nova unless local control could be assured or the designated funds be administered by a local public foundation.

Della-Donna communicated the Trustees' intention to Nova and engaged in a series of private discussions and meetings with the administration and certain board members to avert rescission. A resolution of this problem reached on March 27, 1978 evaporated when the Nova administration reneged on its commitment to return control of the Nova board to local residents. On April 19, 1978, Della-Donna wrote a letter to Nova's president and the members of its board of trustees detailing the negotiations which had been conducted, asserting that Nova had concealed its foreign control and reiterating that the Foundation Trustees were likely to rescind the gift designation unless Nova honored its resolution of March 27, 1978. Della-Donna marked the letter "Confidential" and treated it as such, sending it only to individuals with the authority to determine Nova's conduct.

On April 25, 1978, Nova sued the Unitrust Trustees, including Della-Donna, to obtain the premature disburse-

ment of the funds designated to Nova. Nova issued a press release concerning its lawsuit.

On May 4, 1978, Della-Donna filed an action on behalf of the Goodwin estate and the Foundation Trustees for a declaratory judgment seeking ratification of the Foundation Trustees' rescission of the gift designation to Nova on the basis of Nova's fraudulent concealment of its control by the New York Institute and the New York City-based Schure family.

During the period from April 25 until May 6, 1978 when the first defamatory article was published, Della-Donna issued no press releases and held no press conferences. Indeed, Della-Donna did not initiate any contact with the press. Della-Donna did, however, respond to questions from the press during this period and he did permit a Gore reporter to pick up a copy of a single document prepared by Della-Donna for the Nova Trustees, dated March 27, 1978, which was neither labeled a "press release" nor ever "disseminated" to the press.

Once the first defamation appeared on May 6, 1978, Della-Donna essentially stopped answering questions from the press; he referred all inquiries to his attorney.

The Defamations

The first report about the litigation appeared in the *Fort Landerdale News,* which is published by defendant Gore Newspapers,[2] in response to Nova's first press release (App. A at 3a). A few articles published prior to May 7, 1978 contained statements from Della-Donna which he had provided in response to questions from the local newspaper (App. B at 14a).

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[2] Gore Newspapers also publishes the city's only other newspaper, the *Fort Lauderdale Sun-Sentinel.*

On May 6, 1978, Gore Newspapers published its first defamation against Della-Donna, criticizing the "Goodwin Trust Lawyer" for his "billings in excess of $900,000." Della-Donna's actual legal fees from the trust from 1971 to 1978 were less than $45,000.

On June 3, 1978, Della-Donna was charged with diverting $9 million from the Unitrust to the Goodwin estate and with receiving legal fees in the "unconscionable" amount of $950,000. The $9 million was properly paid to the Goodwin estate from the Unitrust in quarterly installments ending in 1976. These quarterly payments totaling $9 million were mandated by a specific court order. The legal fee, paid by the estate to Della-Donna in 1972, represented 4.5 years of past and future work and was specifically approved by court order.

The July 5, 1978 article reiterated that Della-Donna had billings to the Goodwin estate of "almost $1 million."

Gore Newspapers charged Della-Donna in its February 13, 1979 article with "bilking" the Goodwin estate of $1.3 million—a 1975 court-approved, court-ordered distribution made to Mr. Goodwin's son, the principal beneficiary of the Goodwin estate.[3]

These charges addressed actions taken by Della-Donna in the years from 1971 through 1976 as an attorney for the Goodwin estate and for the Unitrust. They do not address Della-Donna's conduct in 1978 concerning rescission of the Foundation Trustees' designation of Nova or the composition of Nova's board.

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[3] In addition, plaintiff complained about two other articles and a letter to the editor.

The "Public" Debate

The only editorial, published by Gore Newspapers before the defamations against Della-Donna began, concerns itself solely with the issue of local control over Nova. The sole letter to the editor was written by a close friend of the Nova president, whose husband also had ties to Nova.

The rest of the public was apathetic. Nova's president actually complained that the public had not rallied to Nova's cause against Della-Donna and the other Foundation Trustees.

Decisions Below

On September 7, 1983, the trial court granted summary judgment to Gore Newspapers on the grounds that Della-Donna was a limited public figure who had "voluntarily injected himself into the vortex of the public controversy concerning the gift to Nova" (App. B at 15a), and that "there is absolutely no showing of actual malice that would give rise to a cause of action on behalf of a limited public figure" (App. B at 16a).

The trial court found the existence of a controversy over the rescission of the designation of Nova as a donee of the $14.5 million gift in light of the concealed foreign control of Nova's board. The court however ignored the nature of the charged defamations themselves and never even hinted at a possible relationship between the controversy and the defamations.

The trial court offered certain "salient facts." Two of these facts evidence the private nature of the controversy over rescission and control of Nova: the statement by one member of Nova's board to other members occurring at a private meeting of Nova's board weeks before the first

press coverage of the litigations and Nova's April 25, 1978 lawsuit requesting disbursement of the funds (App. B at 14a). The only cited fact even superficially capable of evidencing any "public" debate over rescission and control does not involve the public; the editorial in the *Fort Lauderdale News* on the issue of control was published by defendant Gore Newspapers.

Other "salient facts" concern Della-Donna's purported plunge into the controversy: in a letter marked "Confidential" and sent only to Nova's president and its board, Della-Donna wrote Nova's president on April 19, 1978 charging that Nova had fraudulently misrepresented the fact of local control and threatening to rescind the gift to Nova (App. B at 14a). This letter received no press coverage either when written or later. The court also cited articles in which Della-Donna's positions were reported and his statements were quoted, and Della-Donna purportedly making two documents available to Gore Newspapers (*id.*). Della-Donna did not initiate any contact with the press. He never made any press statements or circulated any materials to the media; he simply answered questions and he essentially stopped doing even that with the appearance of the first defamation on May 6, 1978. Finally, the trial court pointed to Della-Donna's filing an action against Nova for a declaratory judgment ratifying the Foundation Trustees' rescission of the designation of Nova.

On April 23, 1986, the appellate court affirmed, finding that Della-Donna had "initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role" (App. A at 11a). The manner in which the court reaches this conclusion illustrates the need to define the concrete requirements for a public figure finding: the court makes this finding by simply saying it is so. This approach infects the appellate court's

analysis in three critical areas: (1) the existence and scope of the "public controversy"; (2) the nature and extent of Della-Donna's participation in the controversy; and (3) the nexus between the defamations and the public controversy.

The Existence And Scope Of The Public Controversy

After passing reference to *Firestone*, *Hutchinson* and *Wolston* and their warnings not to equate newsworthy private disputes or matters of general interest with public controversies under *Gertz*,[4] the appellate court candidly admitted that "although it is clear that the community had an interest in the outcome of the dispute, it is difficult to identify the public controversy with precision" (App. A at 9a). The court implicitly acknowledged that only "[c]ertain aspects of the disagreement between the Nova trustees and Della-Donna such as local control and fiscal soundness . . . [have an] impact on the public" (App. A at 10a) and wondered whether "public opinion [could] sway the outcome" by "persuading a private donor to make a gift to a private university" [5] (App. A at 9a).

The appellate court simply sidestepped these problems by pronouncing that the dispute between Nova and Della-Donna over the rescission of the gift designation "obviously impact[s] on the public" and thus meets the criterion that " 'persons beyond the immediate participants in the dispute . . . feel the impact of its resolution' " (App. A at

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[4] *Time, Inc.* v. *Firestone*, 424 U.S. 448, 453-454 (1976); *Hutchinson* v. *Proxmire*, 443 U.S. 111, 135 (1979); *Wolston* v. *Readers Digest Ass'n*, 443 U.S. 157, 166 n.8 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

[5] As this Court has expressly informed us, public opinion should have no effect upon the merits of a private legal dispute between private parties nor upon the outcome of the litigation. *Firestone*, 424 U.S. at 454 n.3.

10a), citing *Waldbaum* v. *Fairchild Publications Inc.*, 627 F.2d 1287, 1297 (D.C.Cir.), *cert. denied*, 449 U.S. 898 (1980).[6] The court also found that the "public in some measure was expressing its opinion" (App. A at 10a) even though the "letters to the editor" consisted of one letter, written by a friend of Nova's president whose husband also had ties to Nova and even though the "editorials" amounted to one editorial published by defendant Gore Newspapers.[7] The real public, as Nova's president bitterly complained, was apathetic. Public controversy was thus defined to include a dispute limited to a private civil litigation where the public itself was not participating in the dispute nor seeking to influence the resolution of the private dispute.

Della-Donna's Participation In The Controversy

The appellate court first required Della-Donna to "'play[] a sufficiently central role in that controversy . . .'" (App. A at 10a), citing *Dameron* v. *Washington Magazine, Inc.*, 779 F.2d 736, 741 (D.C.Cir. 1985), *cert. denied*, 106 S.Ct. 2247 (1986). Della-Donna met the criterion when serving as a "trustee and the lawyer of the Trust, [and having] a duty to discharge his obligations as he saw them in order to effectuate his client's wishes . . , he partici-

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[6] Finding a public controversy on this basis in the context of a civil litigation converts all private civil lawsuits involving private parties into public controversies where their outcomes may conceivably affect the public in some way. *Contra: Denny* v. *Mertz*, 106 Wis.2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982) (lawsuit to win control of large public corporation is not a public controversy even though its outcome necessarily affects the 11,500 shareholders, 10,000-11,000 employees and thousands of suppliers, customers and people living where the corporation's plants were).

[7] A defendant cannot immunize itself from libel liability by creating a "public controversy" with its own editorials. *Hutchinson*, 443 U.S. at 135.

pated in the designation of Nova as a beneficiary [and . . .] he negotiated and litigated with Nova when [the Foundation Trustees] determined that the designation was an error and not in accordance with the wishes of [Della-Donna's] deceased client and the settlor of the trust" (App. A at 11a). The court concludes that Della-Donna is not an involuntary public figure because of these purposeful, considered actions.[8]

The Nexus

While noting that the alleged defamation must be germane to the plaintiff's involvement in the controversy (App. A at 10a), the court eliminated this factor as a necessary element to finding Della-Donna a public figure in regard to the charged defamation.[9]

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[8] The court also found that Della-Donna had a continuing, prominent role in the controversy he ignited notwithstanding the fact that the last purposeful Della-Donna action cited by the court (App. A at 3a) took place on May 4, 1978 when he filed the declaratory judgment action—two days before the first defamation and eight months before the last.

[9] It is not surprising that the court failed to analyze this issue. Allegations that Della-Donna had taken unconscionable fees or diverted funds from the trust are simply not germane to the "public controversy" occurring over rescission of the gift designation of Nova because of the concealment of foreign control of the university.

REASONS FOR GRANTING THE WRIT

The Balance Struck In *New York Times* v. *Sullivan*, *Gertz* v. *Robert Welch* And Their Progeny Is Being Skewed By Widespread And Irreconcilable Differences Over The Scope And Application Of The "Vortex" Public Figure Doctrine, Requiring Action By This Court At This Time.

It is time for the Supreme Court "to nail the jellyfish to the wall." [10] Unless the Supreme Court "fleshe[s] out the skeletal description of public figures and private persons enunciated in *Gertz*," [11] the balance struck between the First Amendment and the protection of human dignity will continue to be skewed by decisions like *Della-Donna*.

Della-Donna affords this Court an opportunity to establish rules governing the public figure doctrine in the three areas where lower court decisions have made the doctrine as difficult to pin down as the proverbial jellyfish: the meaning of public controversy, the nature and extent of plaintiff's purposeful activity and the required relationship between the public controversy and the claimed defamation. At stake is the very constitutional underpinning of the *Sullivan* doctrine. The scope of the "vortex" public figure doctrine must be reshaped to fit the First Amendment and its focus on the protection of uninhibited and robust public debate on public issues. *Sullivan*, 376 U.S. at 270; *Dun & Bradstreet, Inc.*v. *Greenmoss Builders, Inc.*,

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[10] Lower courts have found that "defining a public figure is much like trying to nail a jellyfish to the wall." *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F.Supp. 440, 443 (S.D.Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

[11] *Waldbaum*, 627 F.2d at 1292; *see also Harris* v. *Tomczak*, 94 F.R.D. 687, 697 (E.D.Cal. 1982).

105 S.Ct. 2939, 2944-2947 (1985) (plurality). Otherwise, as in *Della-Donna*, an unfocused and over-expanded public figure analysis will strip individuals of their reputations without recourse even though there is no public debate on public issues. In addition, the *Sullivan* protections provided by this Court can effectively deter self-censorship only if they are set forth in precise and predictable rules of analysis.

A. This Court Must Secure The Balance Struck In *Sullivan*, *Gertz* And Their Progeny By Requiring The State And Lower Federal Courts To Shape The "Vortex" Public Figure Doctrine To Fit The First Amendment.

The First Amendment gives public and binding expression to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." *Sullivan*, 376 U.S. at 270; *see Philadelphia Newspapers, Inc.* v. *Hepps*, 106 S.Ct. 1558, 1561 (1986). This Court has put this commitment into practice by preventing plaintiffs who have thrust themselves into the vortex of a particular public controversy from vindicating their honor and their reputations unless they can prove actual malice under *Sullivan*—i.e., that they were the victims of calculated or reckless lies. *Sullivan*, 376 U.S. at 279-280; *Gertz*, 418 U.S. at 345-346.

Requiring public plaintiffs to prove actual malice administers an "extremely powerful antidote" to the poison of media self-censorship, but the price exacted from libel victims is correspondingly high. *Gertz*, 418 U.S. at 342. In practice, "vortex" public figures virtually never can collect compensation for the damage done to their reputations, nor vindicate their honor by demonstrating that the defamation was false. A public price is also paid; we sacrifice a competing tenet of our constitutional system: " 'our basic concept of the essential dignity and worth of

every human being—a concept at the root of any decent system of ordered liberty.'" *Gertz*, 418 U.S. at 341, quoting *Rosenblatt* v. *Baer*, 383 U.S. 75, 92 (1966) (J. Stewart, concurring). This Court has thus shaped the "vortex" public figure doctrine to fit the First Amendment values requiring protection. The Court has applied the doctrine only to defamations published in pre-existing[12] public controversies[13] about the public conduct[14] of individuals who have plunged into the vortex of the controversy and who have engaged public attention for the purpose of influencing its outcome.[15] But in the seven and one-half years since this Court last addressed the doctrine in *Wolston*, confusion has reigned in the state and lower federal courts about the proper scope of the doctrine. That confusion subverts the very values the doctrine was designed to serve.[16]

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[12] "Those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson*, 443 U.S. at 135.

[13] Not all newsworthy events qualify. Mary Alice Firestone's much-publicized divorce "is not the sort of 'public controversy' referred to in *Gertz* even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." *Firestone*, 424 U.S. at 454. Even issues of genuine and legitimate public concern do not come within the orbit of a public controversy where there is no public debate. General public concern over public expenditures is not a public controversy under *Gertz*. *Hutchinson*, 443 U.S. at 135; *see Wolston*, 443 U.S. at 166 n.8 (doubting the existence of a public controversy about the desirability of permitting Soviet espionage in the United States when "all responsible United States citizens understandably were and are opposed to it").

[14] *See Sullivan*, 356 U.S. at 279-280, preventing recovery by a public official "for a defamatory falsehood *relating to his official conduct*" unless he can prove it was made with knowledge of or reckless disregard for its falsehood (emphasis added).

[15] *Gertz*, 418 U.S. at 351.

[16] Permitting the press to print with impunity defamations concerning the private affairs of public persons does not contribute

(footnote continued on following page)

B. Rules Governing "Vortex" Public Figures Should Be Both Precise And Predictable.

In shaping the "vortex" public figure doctrine to fit the First Amendment, the courts must do so with precision and predictability. The press cannot avoid unnecessary self-censorship if they cannot accurately predict (1) whether they will be sued; (2) whether they will win; and (3) how much the litigation will cost. L. Tribe, *American Constitutional Law* §12-13 642 (1978) ("Tribe") (although the decision to publish involves a complex calculus, these are the salient factors). Deciding who is a "vortex" public figure, and thus who must prove actual malice and bear the other burdens triggered by actual malice,[17] significantly affects two out of three[18] factors. It is obviously much more difficult for public figures to win. *Gertz*, 418 U.S. at 342-343, 346; Eaton, *The American Law of Defamation Through Gertz* v. *Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va.L.Rev. 1349, 1375 (1975); Tribe, §12-13 at 638-640; *see* Libel Defense Resource Center Bulletin No. 17 at 27-28 (Spring, 1986) (even before

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(footnote continued from previous page)

to self-government. *See Gertz*, 418 U.S. at 353. And giving full First Amendment protection to private disputes of only general interest to the public undermines our commitment to the concept of human integrity without measurably enhancing public debate on public issues. *See Greenmoss Builders, Inc.*, 105 S.Ct. at 2943.

[17] A "vortex" public figure's complaint will be dismissed on summary judgment unless he or she can provide clear and convincing evidence of actual malice. *Anderson* v. *Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2513 (1986). In addition, the determination that there was clear and convincing evidence that a defendant published the defamation with knowledge of or reckless disregard for its falsity is subject to *de novo* review on appeal. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984).

[18] If plaintiffs consult experienced libel lawyers before filing suit, even the likelihood of the press being subjected to a suit will be affected.

Liberty Lobby, libel defendants were obtaining summary judgment three out of every four times). Public figure litigation costs less because summary judgment is more available. Tribe, §12-13 at 642; *see* Anderson, *Libel and Press Self-Censorship,* 53 Tex.L.Rev. 422, 437-438 (1975).

Precision in defining "vortex" public figures protects another value implicitly recognized by *Gertz;* "[d]emocracies should avoid deterring citizen involvement in public affairs." *Waldbaum,* 627 F.2d at 1293 n.11, citing *Gertz,* 418 U.S. at 352. Fear of being stripped of their reputations without recourse may deter some individuals from engaging in public activities or speaking out on public issues. Clear and precise rules for determining who is a "vortex" public figure will allow them "to calculate correctly, and not overestimate or underestimate, the effect that undertaking some activity will have on the legal recourse available to [them]. . . ." *Waldbaum,* 627 F.2d at 1293.

C. There Are Widespread And Irreconcilable Differences In The State And Lower Federal Courts Over The Proper Scope And Application Of The "Vortex" Public Figure Doctrine.

The state and lower federal courts have had ample opportunity to apply the "broad rules of general application" set forth in *Gertz,* 418 U.S. at 343-344. There are now widespread and irreconcilable differences in how these courts define public controversy; how they determine when an individual has plunged into the vortex of the controversy to engage the public's attention and influence its outcome; and how they assess the nexus between the defamation and the controversy. The necessary result of this confusion is that neither public speech nor the precious

reputations of private figures are given the protection intended by *Sullivan* and *Gertz*.

1. *Public Controversy.*

While this Court has explained that public controversies involve something more than mere issues of general public concern, *Hutchinson*, 443 U.S. at 135, the basic attributes of "public controversy" remain a matter of vast confusion. Some courts read "controversy" to mean what it says,[19] requiring "a real dispute." *Waldbaum*, 627 F.2d at 1296; *see Gannett Co., Inc.* v. *Re*, 496 A.2d 553, 558 (Del. 1985). But the Third Circuit disagrees, rejecting "the notion that merely because most people would agree that drug trafficking is undesirable, there is no 'controversy' regarding the matter." *Marcone* v. *Penthouse International Magazine for Men*, 754 F.2d 1072, 1083 n.8 (3d Cir. 1985). In direct and irreconcilable conflict is *Rancho La Costa, Inc.* v. *Superior Court (Penthouse Int'l, Ltd.)*, 106 Cal.App.3d 646, 658-659, 165 Cal.Rptr. 347, 354-355 (1980), *appeal dismissed*, 450 U.S. 902 (1981), where there was no public controversy over the "desirability" of "organized crime" because "[a]ll conscientious and responsible people are opposed to it."

When a dispute constitutes a controversy is also in conflict. There was no public controversy involving a minister accused of luring Naval recruits into homosexual encounters under the guise of religious counseling even though, only months before the article in question, complaints about plaintiff's sexual advances had caused him to be barred from supervising offenders in a county probation program. *Davis* v. *Keystone Printing Service, Inc.*, 111 Ill.App.3d 427, 438-439, 444 N.E.2d 253, 260 (1982).

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[19] "Controversy" is defined as "a discussion marked esp[ecially] by the expression of opposing views: dispute." *Webster's Ninth New Collegiate Dictionary*, 285 (9th ed. 1983).

In contrast, the fact that complaints had been made about the quality and price of plaintiff's product before the broadcast led the court to conclude that a public controversy did exist. *Steaks Unlimited, Inc.* v. *Deaner,* 623 F.2d 264, 273-274 (3d Cir. 1980).

Similarly, this Court's distinction between "controversies of interest to the public" and "public controversies," *Firestone,* 424 U.S. at 454, is itself a subject of disagreement. Some courts do not insist on public participation in the controversy, requiring only that its outcome have impact or ramifications beyond the immediate participants. *Waldbaum,* 627 F.2d at 1296. On the other hand, the Wisconsin Supreme Court found that a vigorous and successful campaign by dissident shareholders to change the management of a large Milwaukee corporation did not constitute a public controversy even though it had obvious ramifications beyond the immediate participants and generated widespread news coverage reflecting public interest. *Denny* v. *Mertz,* 106 Wis.2d at 649-650, 318 N.W.2d at 147-148. One year later a Michigan court found that the efforts of dissident Teamsters to amend a local's by-laws did constitute a public controversy because the internal union dispute was "of wide public concern." *Lins* v. *Evening News Ass'n,* 9 Media L.Rep. (BNA) 2380 (Mich. Ct.App. Oct. 10, 1983).[20] *Compare Arnold* v. *Taco Properties, Inc.,* 427 So.2d 216, 218 (Fla.1st DCA 1983) (school's dispute with licensing board constituted public controversy

[20] Perhaps the courts draw the distinction along union/management lines. *Compare Waldbaum,* 627 F.2d at 1299 ("Being an executive within a prominent and influential company does not by itself make one a public figure") *with Miller* v. *Transamerican Press, Inc.,* 621 F.2d 721, 724 (5th Cir. 1980), *cert. denied,* 450 U.S. 1041 (1981) ("[plaintiff], a high-ranking official of a union of tremendous importance to our economy, as relates to his official duties is a public figure").

because of "consumer interest aspect" affecting potential students and health care consumers) *with Eastern Milk Producers* v. *Milkweed,* 8 Media L.Rep. (BNA) 2100 (N.D.N.Y. July 16, 1982) (plaintiff's application for a federal loan to finance two cheese processing plants was not a public controversy under *Gertz* even though it was controversial and its resolution would necessarily affect both the working and the cheese-buying public).

2. *Plunging Into The Vortex Of Public Controversy.*

Although *Gertz, Firestone* and *Hutchinson* all addressed the public figure status of attorneys or parties in litigation, clarification is critically needed. Permitting courts to find that a party has thrust himself into the vortex of public controversy merely by bringing or defending a lawsuit may "deter[] either resort to the courts to settle disputes when one believes he has been wronged or active defense when he believes he has been accused of some civil or criminal misconduct unjustifiably." *Waldbaum,* 627 F.2d at 1296 n.23. *Compare Newell* v. *Field Enterprises, Inc.,* 91 Ill.App.3d 735, 754, 415 N.E.2d 434, 448 (1980) (no voluntary injection into public controversy where defamation published before the libel plaintiff had either received the summons or answered the complaint) *with Adams* v. *Maas,* 7 Media L.Rep. (BNA) 1188 (S.D. Tex. Feb. 23, 1981) (plaintiff "plunged" into controversy by voluntarily undertaking practices and activities which private parties brought civil action to stop). *Compare also Milkovich* v. *The News-Herald,* 15 Ohio St.3d 292, 297, 473 N.E.2d 1191, 1195 (1984) (nationally known high school wrestling coach who testified at hearing contesting the disqualification of his squad from the state tournament for fighting at a meet where he was coaching did not thereby thrust himself into the forefront of the controversy to in-

fluence its outcome) *with Friedgood* v. *Peters Publishing Co.*, 13 Media L.Rep. (BNA) 1479, 1480 (Fla.Cir.Ct. Sept. 24, 1986) (applying *Della-Donna* to reverse its earlier ruling denying summary judgment and find that plaintiff, whose testimony as a witness was crucial to convicting her father of the murder of her mother and who "involved" herself in the crime by hiding evidence, played a central role in the controversy).

Neither the merits of private legal disputes nor their resolution should be influenced by press conferences or other efforts to engage public attention. *Firestone,* 424 U.S. at 455 n.3. Thus, parties to litigation who respond to press inquiries or even invite the press to attend judicial hearings do not thereby become public figures unless they are using press coverage of the litigation "to influence the resolution" of other public controversies. *Levine* v. *CMP Publications,* 738 F.2d 660, 672 (5th Cir. 1984); *see Burgess* v. *Reformer Publishing Corp.*, 508 A.2d 1359, 1361-1363 (Vt. 1986) (public figure status turned on factual dispute over whether plaintiff approached the press and used the press to assert his denial of involvement in the embezzlement investigation or whether he merely responded to press inquiries).[21]

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[21] But one court's "response to inquiries" is another court's "manipulation of the press." *Compare Jensen* v. *Times Mirror Co.*, 634 F.Supp. 304, 311-312 (D.Conn. 1986) (the acquiesence by plaintiff, who was the roommate of accused Brinks robber, Kathy Boudin, in interviews conducted by plaintiff's newspaper colleagues is sufficient even though plaintiff contends she was pressured into talking) *with Schultz* v. *Reader's Digest Ass'n, Inc.*, 468 F.Supp. 551, 559 (E.D.Mich. 1979) (plaintiff, an ex-convict allegedly involved in the disappearance of labor leader Jimmy Hoffa, deemed to be a private figure even though he voluntarily responded to reporters' inquiries).

3. *Nexus Between The Defamation And The Public Controversy.*

Finally, at least some courts insist that the alleged defamation "must have been germane to the plaintiff's participation in the controversy." *Waldbaum,* 627 F.2d at 1298; *O'Donnell* v. *CBS, Inc.,* 782 F.2d 1414, 1417 (7th Cir. 1986). But there is confusion; the Sixth Circuit's decision that the manager of a theatre with financial troubles was not a limited public figure regarding allegations about his personal bankruptcy was vacated for a rehearing *en banc. Bichler* v. *Union Bank & Trust Co.,* 715 F.2d 1059 (6th Cir.), *vacated,* 718 F.2d 802 (1983).

Failure to require that the defamation directly relate to the public controversy can result in decisions like *Della-Donna.* There, full First Amendment protection was given to speech concerning purely private conduct—an attorney's purported breaches of fiduciary duty to an estate and a charitable trust[22]—wholly unrelated to the only possible public controversy over rescission of a gift designation to a private university because of the foreign control of the university's board (App. A at 2a, 10a; App. B at 13a-14a). The Supreme Court, however, has given full First Amendment protection only to public debate about public figures over issues of public concern. *Philadelphia Newspapers, Inc.* v. *Hepps,* 106 S.Ct. at 1563. The Supreme Court has not expressly decided what protection should be afforded to speech concerning "the private affairs of a 'public person.'" *Sisler* v. *Gannett Co., Inc.,* No. A-56/57, slip op. at 13 (N.J. Oct. 21, 1986); *see Hepps,* 106 S.Ct. at 1563. The *Sisler* court concluded that such speech

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[22] The evidence on the summary judgment motion showed that Della-Donna never committed any of these breaches—a fact never reported by Gore Newspapers.

should be accorded the relaxed constitutional protection afforded all speech on matters of private concern. *Id.*[23] The issue remains generally unresolved. This Court should in this case define the rules governing speech concerning the private affairs of a "vortex" public figure within the First Amendment focus of *Sullivan.*[24]

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[23] *See also Restatement (Second) of Torts* § 580A (1981) (actual malice standard protects communication "concerning a public official or public figure in regard to his conduct, fitness or role in that capacity").

[24] In addition, the nature of the private conduct of a "vortex" public person needs definitional guidelines by the Court. *Compare Lerman* v. *Flynt Distributing Co., Inc.*, 745 F.2d 123, 137-138 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 2114 (1985) and *Lerman* v. *Chuckleberry Publishing Co.*, 521 F.Supp. 228, 234 (S.D.N.Y. 1981) (photographs purportedly of plaintiff appearing nude in a movie are properly the subject of public controversy even though plaintiff had not injected her own personal conduct or nudity into her discussion of "equal nudes for all") *with Harris* v. *Tomczak*, 94 F.R.D. at 707-708 (plaintiff, who wrote the "self-help" book *I'm Okay—You're Okay* and who would be a "vortex" public figure in the field of psychotherapy, would not be a public figure for the purpose of defendant's charge that he had committed suicide).

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the District Court of Appeal of the State of Florida, Fourth Circuit.

Respectfully submitted,

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December 8, 1986

APPENDICES

APPENDIX A

Opinion of District Court

IN THE

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT JANUARY TERM 1986

Not Final Until Time Expires to File Rehearing

Petition and, if Filed, Disposed of

Case Nos. 83-2146 and 83-2437

ALPHONSE DELLA-DONNA,

Appellant,

v.

GORE NEWSPAPERS COMPANY, a Delaware corporation authorized to do business in the State of Florida, and HAMILTON C. FORMAN,

Appellees.

Opinion filed April 23, 1986

Consolidated appeals from the Circuit Court for Broward County; J. Cail Lee, *Judge.*

Frates Bienstock & Sheehe, Miami; Jonathen W. Lubell and Mary K. O'Melveny of Cohn, Glickstein, Lurie, Ostrin, Lubell & Lubell, New York; and Robert J. O'Toole, Fort Lauderdale, *for appellant.*

Ray Ferrero, Jr., and Ricki Tannen of Ferrero, Middlebrooks, & Strickland, Fort Lauderdale, *for appellee, Gore Newspapers.*

Appendix A—Opinion of District Court

BARKETT, ROSEMARY, *Associate Judge.*

This appeal emanates from a final summary judgment for the Gore Newspaper Company (Gore) in a libel action brought by Alphonse Della-Donna (Della-Donna).

Della-Donna claims that Gore libeled him in a series of articles which ran in the *Fort Lauderdale News* from May 6, 1978, to February 13, 1979. The articles concerned a dispute between Della-Donna and the Trustees of Nova University over the final disbursement of a 14.5 million dollar gift to Nova, a private university located in Broward County. The trial court determined that Della-Donna was a limited public figure and that no genuine issue of material fact existed to show evidence of actual malice. Accordingly, the court entered summary judgment for Gore. We affirm.

Della-Donna is a lawyer who in 1971 provided some complex estate planning for his client, Leo Goodwin, Sr., which included the establishment of a foundation and a charitable remainder trust (Unitrust). Mr. Goodwin, Sr., died on May 28, 1971, without naming any beneficiaries of the trust.

In 1976, the Goodwin Foundation Trustees, of which Della-Donna was one, exercised their power under the Unitrust and designated trust beneficiaries which included Nova University. Approximately two years later, in 1978, appellant and Nova University became embroiled in a dispute regarding the control of the university. Della-Donna advised the trustees of Nova University that Mr. Goodwin, Sr.'s desire was to help *locally* controlled institutions and that he had recently discovered that Nova's Board of Trustees was controlled by the New York Institute of

Technology which, in turn, was controlled by the Schure family in New York. Della-Donna advised Nova's Trustees that the Goodwin Foundation Trustees were inclined to rescind the gift unless Nova agreed to be operated under "some semblance of local control."

Several subsequent meetings between Della-Donna and representatives of the university occurred in an attempt to resolve the dispute. On April 19, 1978, Della-Donna sent a "confidential" letter to all Nova Trustees informing them of the ongoing negotiations and advising that if local control was not effectuated he would be forced to rescind the gift.

On April 25, 1978, Nova filed a petition in the circuit court to force distribution of the gift. Upon the filing of this lawsuit, Gore learned about the dispute and began reporting it. On May 4, 1978, Della-Donna filed a complaint for declaratory relief on behalf of the estate of Leo Goodwin, Sr., charging that Nova had fraudulently misrepresented a material fact concerning its management and control, and seeking to rescind the gift.

Between May 1976 and October 1978, Gore ran a total of 78 articles covering the announcement of the Goodwin gift and the ensuing controversy over rescission. Della-Donna alleges that he was libeled in seven of these. The first six essentially involve reporting the charges made by Nova in court documents that Della-Donna had improperly charged the estate over one million dollars in fees. The last alleged libel involved the printing of an unfavorable letter to the editor concerning the lawsuit and the position taken by Della-Donna therein.

Della-Donna raises two points on appeal: (1) that the lower court erred in finding him to be a "limited public

figure in a matter of public controversy"; and (2) that even if such a finding is correct, the lower court erred in finding that no genuine issues of material fact exist from which a reasonable jury could find actual malice.

In order to determine whether the "actual malice" standard of proof must be applied to Gore's conduct, the status of the plaintiff as a public official, "general" public figure, "limited" public figure, or private figure must be established. This necessitates a brief review of the law's evolution regarding the status of a plaintiff vis-a-vis the standard of proof.

Before 1964, the individual states were free to apply their own law, common or otherwise to the tort of libel. In Florida:

> defendants who did not establish either a privilege or truth as an affirmative defense were subject to strict liability. If a privilege applied to the defendant, the plaintiff could overcome the privilege by proving that the defendant acted with *express* malice. . . . [which] encompasses "ill will, hostility, evil intention to defame and injure." [Emphasis added; citations omitted.]

Miami Herald Publishing Company v. *Ane,* 458 So.2d 239, 240 (Fla. 1984).

In 1964, in the landmark case of *New York Times* v. *Sullivan,* 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964), the United States Supreme Court noted that libel "must be measured by standards that satisfy the first amendment." The Court held that the Constitution limits a state's power to award any damages for libel in actions brought by public officials against critics of their official

conduct unless he or she proves that the statement was made with "actual malice." *Id.* at 283, 84 S.Ct. at 727. In *New York Times,* the advertisement which was the subject matter of the libel claim involved "one of the major public issues of our time." *Id.* at 271, 84 S.Ct. at 721. According to the Court, the actual malice standard was mandated because "debate *on public issues* should be uninhibited, robust, and wide open. . . ." *Id.* at 270, 84 S.Ct. at 721 (emphasis added).

In *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), the same strict standard of proving actual malice was extended to "public figure" plaintiffs. As in *New York Times,* the Court in *Curtis* was deciding a case which involved a public concern:

> We note that the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times.*

Id. at 154, 87 S.Ct. at 1991.

In the plurality opinion of *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 44, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), the Court indicated that the distinction between private and public figures was meaningless. As long as the defamatory statements involved "a matter of public or general interest," the *New York Times* standard would apply. *Id.* at 43-44, 91 S.Ct. at 1820. Three years later, however, in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court held that the protections of *New York Times* did not extend as far as *Rosenbloom* had suggested.

Gertz clearly involved expression on a matter of public or general interest and concern, but the court held that

the fact that expression concerned a public issue did not *by itself* entitle the libel defendant to the constitutional protections of *New York Times*. The *Gertz* court further refined the concept of "public figure" noting that there were two classes of public figures: "general public figures" who have fame or notoriety in a community and who are always for every purpose to be considered public figures and "limited public figures" who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" and who are public figures only with regard to certain issues. *See id.* at 345, 94 S.Ct. at 3009. Utilizing this analysis, the court determined that Gertz, who, as in this case, was a lawyer representing a client, was a *private* figure. The issue then became whether the *New York Times* standard of "actual malice" applied to a discussion of any issue of significant public interest when the person defamed therein was a private person. The court determined that in such a situation the standard of actual malice must be used to recover presumed or punitive damages, but that a lesser standard of fault as determined by each state could be used to recover actual damages if those damages could be proved. *Id.* at 348-50, 94 S.Ct. at 3011-12.

In Florida, our supreme court has adopted negligence as the applicable standard for recovery of actual damages in a case which involved a private figure and a public issue. *Miami Herald Publishing Co.* v. *Ane*, 458 So.2d 239 (Fla. 1984). Although language in *Ane* appears to interpret *Gertz* as eliminating the issue of public interest or concern from a discussion of the standard, the latest case from the United States Supreme Court, decided after *Ane*, interprets *Gertz* and makes clear that courts must consider

whether the alleged libel concerns a matter of public or private concern. *See Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, —— U.S. ——, 105 S.Ct. 2939, —— L.Ed.2d —— (1985).

In *Dun & Bradstreet*, the Supreme Court faced the issue of whether *Gertz* should apply when the plaintiff is private *and* the allegedly false and defamatory statements do *not* involve a public issue. The Court indicated that the pivotal question of whether speech addresses a matter of public concern must be determined by the expressions, content, form, and context as revealed by the entire record. *Id.* at ——, 105 S.Ct. at 2939. That determination must be made despite language in *Gertz* to the contrary. The Court concluded that an erroneous credit report did *not* involve a matter of public concern and accordingly permitted the recovery of presumed and punitive damages absent a showing of actual malice. *Id.* at ——, 105 S.Ct. at 2947-48. In light of *Dun & Bradstreet*, it appears the Supreme Court interprets the language in *Gertz* regarding determination of public versus private concerns as simply a rejection of *Rosenbloom*. Thus, notwithstanding the reluctance to permit courts to determine what is and what is not a matter of general or public interest, courts are required to do so.

In reviewing the Supreme Court cases from *New York Times* through *Dun & Bradstreet*, two considerations seem to be required in determining the standard of proof in defamation cases: (1) whether the alleged defamation arose out of a matter of public or private concern; and (2) whether the plaintiff is a public official, public figure, or limited public figure or private person.

We have no trouble determining that the instant case involves alleged defamation arising out of a matter of

public interest or concern. Nova University is an important part of its community and certain aspects of the disagreement between the Nova trustees and Della-Donna, such as local control and fiscal soundness, have an appreciable impact on the community. Thus, we believe the "speech" involved here addresses a matter of public concern in light of the "content, form, and context . . . as revealed by the whole record." *See Dun & Bradstreet,* —— U.S. at ——, 105 S.Ct. at 2947. Consequently, the next step is to determine the status of Della-Donna.

The parties agree that Della-Donna is *not* a public official or a general public figure. They disagree, however, on whether he is a "limited public figure" or simply a private plaintiff. Determining Della-Donna's status entails a two-step process. We must first identify a "public controversy" and secondly inquire into the nature and extent of the plaintiff's participation in that controversy. *Street* v. *National Broadcasting Co.,* 645 F.2d 1227, 1234 (6th Cir. 1981), *dismissed pursuant to stipulation,* 454 U.S. 1095, 102 S.Ct. 667, 70 L.Ed.2d 636 (1981). *See Hutchinson* v. *Proxmire,* 443 U.S. 111, 135, 99 S.Ct. 2675, 2688, 61 L.Ed. 2d 411 (1979); *Wolston* v. *Readers Digest Ass'n,* 443 U.S. 157, 164-69, 99 S.Ct. 2701, 2706-08, 61 L.Ed.2d 450 (1979); *Time, Inc.* v. *Firestone,* 424 U.S. 448, 453, 96 S.Ct. 958, 964, 47 L.Ed.2d 154 (1976); *Gertz,* 418 U.S. at 345, 94 S.Ct. at 2997.

In the context of determining the status of a plaintiff, a public controversy has been defined as "any topic upon which sizeable segments of society have different, strongly held views." *Lerman* v. *Flynt Distributing Co.,* 745 F.2d 123, 138 (2d Cir. 1984), *cert. denied,* —— U.S. ——, 105 S.Ct. 2114, —— L.Ed.2d —— (1985). Attracting the pub-

lic's interest is not enough. Thus, an essentially private dispute such as a divorce, regardless of the public's interest, is not a public controversy. *Firestone,* 424 U.S. at 453-54, 96 S.Ct. at 958.

Similarly, in *Hutchinson* the Court determined that the "broad question of concern about [federal] expenditures" as it related to the plaintiff's receipt of a federal grant was not a "public controversy." 443 U.S. at 135, 99 S.Ct. at 2688. Hutchinson was a government funded research scientist whose research efforts were publicly criticized by Senator Proxmire who designated Hutchinson as a recipient of his well-known "Golden Fleece" awards. *See also Wolston,* 443 U.S. at 166 n.8, 99 S.Ct. at 2707 (where the Supreme Court observed that it was difficult to determine with precision the "public controversy" into which the plaintiff allegedly thrust himself, but determined that Wolston was a private plaintiff because his actions did not constitute a voluntary thrusting or injecting into the alleged controversy).

In this case, although it is clear that the community had an interest in the outcome of the dispute, it is difficult to identify the public controversy with precision. Is it the issue of local control of Nova University or the fact that the university may suffer significant economic hardship if the Goodwin gift is not forthcoming? What exactly is the role of the public in this controversy? Is it anything more than taking sides in a disagreement between private litigants? Is the public interest in a community's university which is served by persuading a private donor to make a gift to a private university sufficient to constitute a public controversy? Could public opinion sway the outcome?

We have no trouble determining that this dispute was a matter of public interest. Designating it a public contro-

versy for purposes of the limited public figure analysis is, perhaps, more troublesome. Certain aspects of the disagreement between the Nova trustees and Della-Donna such as local control and fiscal soundness obviously impact on the public. The public in some measure was expressing its opinion through letters to the editor and editorials. These elements, among others, cast doubt on the view that this is strictly a private matter.

In *Waldbaum* v. *Fairchild Publications*, 627 F.2d 1287, 1297 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980), the court articulated a test for the determination of a public controversy. The court stated:

> A general concern or interest will not suffice. . . . [The court] should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy [footnotes omitted].

Applying this test to the instant case, the dispute involved in the instant case constituted a public controversy.

In addition to defining public controversy, the *Waldbaum* court also set out a three-part test for determining whether a person has become a limited purpose public figure. "Under this test the court must determine that there is a public controversy; ascertain that the plaintiff played a sufficiently central role in that controversy; and find that the alleged defamation was germane to the plaintiff's involvement in the controversy." *Dameron* v. *Wash-*

ington Magazine, Inc., 779 F.2d 736, 741 (D.C. Cir. 1985) (citing *Waldbaum*).

We have determined the existence of a public controversy. The question is whether Della-Donna played a central role in the controversy. The facts of this case require an affirmative answer to that question. It is true that Della-Donna was the trustee and the lawyer of the Trust in question. He had a duty to discharge his obligations as he saw them in order to effectuate his client's wishes. As a trustee, he participated in the designation of Nova as a beneficiary of the trust. As a trustee and lawyer for the trust he negotiated and litigated with Nova when he determined that the designation was an error and would not be in accord with the wishes of his deceased client and the settlor of the trust. Della-Donna argues that neither his actions as trustee and lawyer nor his position as a party in the litigation can make him a limited public figure. By placing primary emphasis on the plaintiff's motivation, Della-Donna forgets that "it may be possible for someone to become a public figure through no *purposeful* action of his own. . . ." *Gertz*, 418 U.S. at 345 (emphasis supplied). *Dameron*, 779 F.2d at 742.

This is not, however, one of those rare cases where the plaintiff became a limited public figure involuntarily. On the contrary, Della-Donna initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role. Thus, Della-Donna fully met *Waldbaum*'s second criterion: "The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." 627 F.2d at 1297. That Della-Donna was

motivated by fiduciary obligations or ethical responsibilities is irrelevent.

Having determined Della-Donna to be a limited public figure, we have examined the record and concur with the trial court that no genuine issue of material fact exists from which a reasonable jury could find actual malice.

The summary final judgment is affirmed.

DOWNEY, *J.*, and HURLEY, DANIEL T.K., *Associate Judge*, concur.

APPENDIX B

Order Granting Summary Judgment and Final Summary Judgment

IN THE

CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

Case No. 80-5162 CD — "J" Lee

ALPHONSE DELLA-DONNA,

Plaintiff,

v.

GORE NEWSPAPERS COMPANY, etc., *et al.,*

Defendants.

THIS CAUSE came on for consideration before the Court upon the Motion of Defendant GORE NEWSPAPERS COMPANY (GORE) for Summary Judgment. Discovery has been conducted by all parties. The Court having considered the pleadings, affidavits, depositions and exhibits attached thereto, having had the benefit of written memoranda filed by both parties and having heard oral arguments and being fully informed in the premises hereby finds the following:

Plaintiff, ALPHONSE DELLA-DONNA, charged that the Defendant, GORE, libeled him in a series of articles which ran in the Fort Lauderdale News from May 6, 1978 to February 13, 1979. The articles concerned an ongoing controversy over the final disbursement of a 14.5 Million Dollar gift to Nova University; a private university located

in Broward County, and the composition of the Nova Board of Trustees. The Plaintiff, an attorney, was one of three trustees of the 'Unitrust' established by Leo Goodwin, Sr., founder of GEICO Insurance Company, and personal representative of the Leo Goodwin, Sr., Estate.

Some of the salient facts regarding the gift dispute are as follows:

On April 19, 1978, Plaintiff sent a letter to Abraham Fischler, President of Nova, charging "a fraudulent misrepresentation" and threatening to set aside the selection of Nova as donee of the Unitrust unless changes in the composition of the Nova Board of Trustees were made to ensure local control.

On April 25, 1978, Dr. David Salten, a Nova and NYIT Trustee, delivered a statement to the Nova Trustees critical of Nova and of Plaintiff's demands.

A petition was filed in Broward County Circuit Court by Nova on April 25, 1978, requesting that the funds be disbursed, and a press release regarding the filing of the petition was simultaneously issued by Nova.

In the ensuing days, several articles appeared in which Plaintiff's positions were reported and his statements quoted.

On May 3, 1978, the Fort Lauderdale News took an editorial position on the gift dispute which supported the Plaintiff's views.

On the same day, Plaintiff made available to the Defendant, GORE, a four-page document and a memorandum dated March 27, 1978, containing two options he had presented to Nova. These facts were reported by GORE.

On May 4, 1978, Plaintiff caused to be filed on behalf of the Estate of Leo Goodwin, Sr. a Complaint for Declara-

tory Judgment seeking Court approval of the recision of Nova as a donee of the Unitrust. The Complaint charges in part that Nova had made a fraudulent misrepresentation of material fact concerning the management and control of Nova. The filing of that Complaint and the charges contained therein were reported by GORE on May 5, 1978.

Based upon the entire record before the Court, the Court finds as a matter of law that the Plaintiff, ALPHONSE DELLA-DONNA, was a limited public figure in a matter of public controversy within the context of this lawsuit. *Arnold* v. *Taco Properties, Inc.*, 427 So.2d 216 (Fla. 1st DCA 1983).

Additionally, it is clear that the Plaintiff, ALPHONSE DELLA-DONNA, if he did not actually initiate the controversy out of which all of this arose, at the very least, voluntarily injected himself into the vortex of the public controversy concerning the gift to Nova. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Gertz* v. *Robert Welch*, 418 U.S. 322 (1974). In *Curtis*, the Supreme Court ruled that those who "voluntarily inject their personality into the 'vortex' of an important public controversy are to be deemed limited public figures."

As a limited or 'vortex' public figure, Plaintiff is required to show that the allegedly defamatory statements were published with "actual malice." "Actual malice" is defined as publication "with the knowledge that it was false or with reckless disregard of whether it was false or not," *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). The extensive discovery conducted by the parties as evidenced by the record before the Court has failed to demonstrate by clear and convincing evidence that Defendant published the articles knowing they were deliberately false or published recklessly with serious doubts as to the truth

of the statements made. *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). In fact, it is clear that there is absolutely no showing of actual malice that would give rise to a cause of action on behalf of a limited public figure.

There being no genuine issue as to any material fact before the Court, the moving party is; therefore, entitled to judgment as a matter of law. Fla.R.Civ.P. 1.510(c).

ORDERED AND ADJUDGED that the Defendant's Motion for Summary Judgment be and the same is hereby granted as to all Counts of Plaintiff's Complaint, and that Final Summary Judgment is hereby granted for the Defendant, GORE, and against the Plaintiff, ALPHONSE DELLA-DONNA, and Defendant GORE shall go hence without day. The Court retains jurisdiction of this cause for the assessment of taxable costs upon proper motion and notice by the Defendant, GORE.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida the 7th day of September, 1983.

A TRUE COPY

J. CAIL LEE

.....

J. CAIL LEE
Circuit Judge

Copies furnished to:

Ray Ferrero, Jr., Esq.
Jonathan W. Lubell, Esq.
Robert J. O'Toole, Esq.
Scott A. DiSalvo, Esq.
Karen Coolman Amlong, Esq.

APPENDIX C

Decision of Supreme Court of Florida

SUPREME COURT OF FLORIDA

TUESDAY, SEPTEMBER 9, 1986

Case No. 69,026

District Court of Appeal, Fourth District
No. 83-2146, 83-2437

ALPHONSE DELLA-DONNA,

Petitioner,

v.

GORE NEWSPAPERS COMPANY, a Delaware corporation authorized to do business in the State of Florida, and HAMILTON C. FORMAN,

Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

McDONALD, *C.J.*, BOYD, OVERTON and EHRLICH, *J.J.*, concur
ADKINS, *J.*, dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Betsy Hell
/s/ BETSY HELL
Deputy Clerk

[SEAL]

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. J. Cail Lee, Judge

Alan C. Sundberg, Esquire
George N. Meros, Jr., Esquire
Cynthia S. Tunnicliff, Esquire
W. Douglas Hall, Esquire
Frates, Bienstock & Sheehe, P.A.
Robert J. O'Toole, Esquire
Johnathan W. Lubell, Esquire
Ray Ferrero, Jr., Esquire
Ricki Tannen, Esquire